

WILKINSON, BARKER, KNAUER & QUINN, LLP

Washington, DC
Frankfurt, Germany

2300 N Street, NW
Washington, DC 20037-1128

telephone: 202.783.4141
facsimile: 202.783.5851

DOCKET FILE COPY ORIGINAL

September 24, 1997

RECEIVED

SEP 24 1997

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Re: *Policy and Rules Concerning the Interstate, Interexchange Marketplace,*
- CC Docket No. 96-61
- Motion for Stay of Enforcement of
PrimeCo Personal Communications, LP

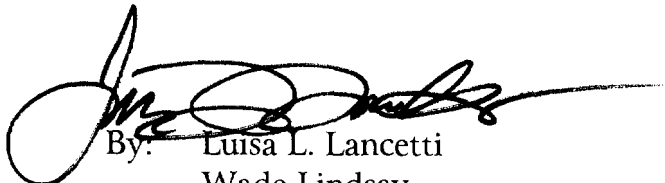
Dear Mr. Caton:

Yesterday, PrimeCo Personal Communications, LP ("PrimeCo") filed a motion for stay of enforcement in the above-referenced proceeding. It has come to our attention that while the original filing was complete, some of the file copies may have been incomplete. Accordingly, out of an abundance of caution, we are supplying an additional five copies of the filing. Additional copies of the motion have also been served upon all parties listed in the certificate of service attached to the motion.

Please contact us should you have questions concerning the foregoing.

Sincerely yours,

WILKINSON, BARKER, KNAUER & QUINN, LLP


By: Luisa L. Lancetti
Wade Lindsay

Enclosure

No. of Copies 025
Listed Below

STAMP & RETURN

BEFORE THE
Federal Communications Commission
WASHINGTON, DC 20554

In the Matter of)
)
Policy and Rules Concerning the Interstate,)
Interexchange Marketplace)
)
Implementation of Section 254(g) of the)
Communications Act of 1934, as amended)

SEP 23 1997

CC Docket No. 96-61

**MOTION FOR STAY OF ENFORCEMENT OF
PRIMECO PERSONAL COMMUNICATIONS, LP**

PrimeCo Personal Communications, LP ("PrimeCo"), an A and B Block broadband PCS licensee,¹ hereby requests, pending reconsideration of the *Reconsideration Order*² in the above-captioned proceeding, that the Commission stay the enforcement of Section 64.1801 of the Commission's rules to the extent that the *Reconsideration Order* extends the application of Section 64.1801 to Commercial Mobile Radio Service ("CMRS") carriers and to carriers which they control or own. The decision to apply rate integration obligations to CMRS providers has serious procedural deficiencies and will have severe repercussions for PrimeCo, the CMRS industry, and the public interest. A stay of enforcement of Section 64.1801 as applied to CMRS is thus warranted and will secure the *status quo ante*, permitting the Commission to remedy the procedural infirmities and develop a record upon which it may resolve the many

¹ PrimeCo is the broadband PCS licensee or owns a majority ownership interest and is the sole general partner in the licensee in the following MTAs: Chicago, Milwaukee, Richmond-Norfolk, Dallas-Ft. Worth, San Antonio, Houston, New Orleans-Baton Rouge, Jacksonville, Tampa-St. Petersburg-Orlando, Miami and Honolulu.

² *Policy and Rules Concerning the Interstate, Interexchange Marketplace, Implementation of Section 254(g) of the Communications Act of 1934, as amended*, CC Docket No. 96-61, *First Memorandum Opinion and Order on Reconsideration*, FCC 97-269 ¶ 18 (July 30, 1997) ("Reconsideration Order").

implementation issues of the integration and affiliate rules to the extent that they apply to the CMRS industry.

At a minimum, however, the Commission should stay enforcement of the affiliate aspect of the integration rule. This “affiliate requirement” is not mandated by the express language of Section 254(g), but rather arises from Commission interpretation. Further, application of the affiliate rule in the CMRS context arguably may require CMRS providers to engage in unlawful price fixing and otherwise violate the Commission’s important pro-competition policies. In support thereof, PrimeCo states the following:

I. INTRODUCTION

On July 30, 1997, the Commission issued the *Reconsideration Order* disposing of petitions for reconsideration of the August 7, 1996 *Rate Averaging/Integration Order*³ with regard to issues concerning implementation of the rate integration requirements of Section 254(g) of the Communications Act.⁴ The *Reconsideration Order* established for the first time that rate integration applies to CMRS providers.⁵ In addition, the Commission, in its opinion, “clarified” that rate integration was required “across affiliates,” including a parent company and all affiliates which it controls.⁶ This “affiliate requirement” is not mandated by the express

³ 11 FCC Rcd 9564 (CCB 1996).

⁴ The FCC deferred action on petitions addressing the geographic rate averaging rule. *Reconsideration Order* at ¶ 1.

⁵ *Id.* at ¶ 18.

⁶ The Commission will rely on the definitions of “control” and “affiliate” set forth in 47 C.F.R. § 32.9000 to determine when a carrier is an affiliate subject to the rate integration rule. *Id.* at ¶ 17

language of Section 254(g). Instead, the Commission adopted the affiliate rule based upon its interpretation of the legislative purposes underlying Section 254(g).⁷

PrimeCo does not concur with the Commission's decision to apply rate integration obligations to CMRS providers. To that end, PrimeCo will file a petition for reconsideration and/or clarification as necessary to obtain relief from the *Reconsideration Order*.

Nevertheless, reconsideration does not stay the effectiveness or enforcement of Section 64.1801 as interpreted by the *Reconsideration Order* and PrimeCo has an immediate concern that cannot await resolution of the reconsideration process. As discussed below, PrimeCo is not capable of complying with the affiliate integration requirement, as that requirement is currently established. The problem arises because PrimeCo is arguably "controlled" by three separate entities — AirTouch Communications, Inc. ("AirTouch"), U S WEST, Inc. ("U S WEST"), and Bell Atlantic. Each of these carriers charges different rates for its own interstate, interexchange CMRS operations. Moreover, each carrier also shares control with other entities in other CMRS licensees. Compliance with the affiliate rule as written will therefore arguably require separate and competing telecommunications carriers to agree to integrate their CMRS interstate, interexchange rates with PrimeCo's rates for such service. Such a result appears on its face arguably to require carriers to engage in unlawful price fixing and directly conflicts with important antitrust policies as well as the Commission's own pro-competitive policies.

PrimeCo does not believe these results were intended, or even foreseen, by the Commission. Indeed, the rate integration rule and affiliate requirement were imposed upon CMRS carriers almost in passing. Neither the *Notice of Proposed Rulemaking* nor the *Rate Averaging/Integration Order* mention CMRS providers. Further, the *Reconsideration Order*

⁷ See *id.* at ¶ 16.

refers to the application of the rate integration rule to CMRS providers in only one sentence. In short, the affiliate requirement was imposed upon CMRS carriers without a record or substantive discussion of the repercussions of such action.

Given these fundamental defects (both substantive and procedural), PrimeCo respectfully requests the Commission to stay immediately enforcement of Section 64.1801 as it applies to CMRS carriers or, at a minimum, to stay enforcement of the affiliate requirement, pending resolution of petitions for reconsideration or clarification. A temporary stay will maintain the *status quo ante* and provide the Commission an opportunity to develop a record and analyze the many, complex issues related to application of rate integration and affiliate rules to the CMRS industry.⁸

A temporary stay of enforcement would be consistent with prior Commission precedent. In at least two circumstances, the Commission has stayed the effectiveness of a rule where it became aware of unanticipated and unintended consequences of the rule after adopting such rule.⁹ Stay was deemed appropriate in these cases to permit the Commission to develop a record and undertake a further analysis in light of the unanticipated concerns. Similarly, a stay is appropriate here.

⁸ As an exercise of discretionary authority, stay of enforcement may not require satisfaction of the four-part test for granting stay set forth in *Virginia Petroleum Jobbers Ass'n v. FPC* and applied by the Commission. See *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958); *Communique Telecommunications, Inc.*, 10 FCC Rcd 10399, 10406 (1995). Nevertheless, this request for stay meets the *Virginia Petroleum Jobbers* standard. Further, the Commission's forbearance authority supports grant of a discretionary stay of enforcement.

⁹ *Policies and Rules Concerning Unauthorized Changes of Consumer's Long Distance Carriers*, 11 FCC Rcd 856 (1995); *Amendment of Part 22 of the Commission's Rules Relating to License Renewals in the Domestic Public Cellular Radio Telecommunications Service*, 8 FCC Rcd 8135 (1993).

II. THE COMMISSION SHOULD STAY ENFORCEMENT OF THE RATE INTEGRATION RULE AND AFFILIATE REQUIREMENT PENDING RECONSIDERATION OF THE *RECONSIDERATION ORDER*

A. The Commission's Decision to Apply Rate Integration and the Affiliate Rule to CMRS is Procedurally Deficient.

The Commission's decision to impose rate integration and affiliate requirements upon CMRS providers fails to satisfy even the most minimal legal requisites for adoption of a valid rule. Section 254(g) was intended to codify the Commission's existing rate integration policy, which had never been applied to CMRS.¹⁰ Thus, the decision to apply rate integration to CMRS is unprecedented.

Further, a review of the record reveals little to no information supporting the need for integration of CMRS interstate, interexchange rates. Moreover, there is a total lack of information regarding the potential problems associated with imposing rate integration with the affiliate requirement upon CMRS providers. For example, CMRS operates without regard to exchange boundaries; CMRS is an end-to-end service in which carriers do not unbundle long distance and local service. Thus, it is unclear which, if any, CMRS offerings must be rate integrated. In addition, there are numerous instances in which CMRS providers do not assess toll charges for interstate calls, and therefore it is unclear what rates (toll and/or airtime) must be integrated. Finally, as discussed below, CMRS carriers simply cannot comply with the affiliate requirement as currently established. Unfortunately, however, the record of this proceeding contains no evidence to facilitate Commission analysis of these important concerns.

This lack of evidence apparently resulted in a dearth of discussion and analysis in the Commission's orders in this proceeding. Indeed, the rate integration rule and affiliate

¹⁰ See *Reconsideration Order* at ¶ 2; see also S. Rep. No. 230, 104th Cong., 2d Sess. 1, 132 (1996).

requirements were imposed upon CMRS carriers almost in passing. Neither the *Notice of Proposed Rulemaking* nor the *Rate Averaging/Integration Order* even mention CMRS carriers. Further, the *Reconsideration Order* refers to the application of the rate integration rule to CMRS providers in only one subordinate clause.

[W]hile the rate integration provision applies to *all* interstate inter-exchange telecommunications services and *therefore requires CMRS providers to provide the interstate interexchange CMRS service on an integrated basis in all their states*, it does not require a carrier to offer interexchange CMRS service and other interstate interexchange services under one rate schedule.¹¹

In short, the decision to impose rate integration and the affiliate rule upon CMRS providers does *not* constitute reasoned decision-making based upon substantial evidence on the record. Further, the “affiliate requirement” is not mandated by the express language of Section 254(g). Instead, the Commission adopted the affiliate rule based upon its interpretation of the legislative purposes underlying Section 254(g).¹² It is fundamentally arbitrary and capricious for the Commission to adopt a statutory interpretation that imposes new regulatory burdens upon CMRS providers, without careful analysis based upon record evidence.¹³ Given these fundamental defects, and the fact that, as shown below, the affiliate requirement will have serious anti-competitive consequences, there is a strong probability that, at a minimum, the affiliate requirement will be rescinded or revised upon reconsideration.

¹¹ *Reconsideration Order* at ¶ 18 (emphasis supplied).

¹² *See id.* at ¶ 16.

¹³ Until now, the Commission has refused to impose rate regulation upon the CMRS industry in order to promote competition. *See, e.g., Implementation of Sections 3(n) and 332 of the Communications Act; Regulatory Treatment of Mobile Services*, 9 FCC Rcd. 1411, 1511 (1994). At its core, however, rate integration is a form of rate regulation. Further, when coupled with the affiliate requirement, rate integration in the CMRS context becomes an invasive and pernicious form of rate regulation.

B. Enforcement of the Affiliate Requirement will Result in Irreparable Harm to PrimeCo and Will Have Significant Anti-Competitive Effects

Application of the affiliate rule will have significant anti-competitive effects and will profoundly disrupt PrimeCo's ownership arrangements making it extremely difficult, if not unlawful, for PrimeCo to comply with the rule. The *Reconsideration Order* states that the "current definitions of 'affiliate' and 'control' in section 32.9000 of the Commission's rules will be used to determine whether companies are sufficiently related so that they must integrate rates."¹⁴ This reliance upon 47 C.F.R. § 32.9000 makes the reach of the affiliate requirement extraordinarily broad and appears to require rate integration among all affiliated carriers that are either commonly owned *or* controlled.¹⁵

PrimeCo is owned by two partnerships, each with a 50 percent interest: PCS Nucleus, L.P. and PCSCO Partnership. PCS Nucleus, L.P. and PCSCO Partnership are not carriers; they are intermediary partnerships owned by carriers to manage the PrimeCo partnership. PCS Nucleus, L.P. is owned 50/50 by AirTouch PCS Holding, Inc. and U S WEST PCS Holdings, Inc., which in turn are owned by AirTouch and U S WEST respectively. PCSCO Partnership is owned by Bell Atlantic Personal Communications, Inc., which is owned by Bell Atlantic. Under Section 32.9000, each of the two partnerships is controlled by each of their partners insofar as each partner has the ability to veto or "block" any action taken by its

¹⁴ *Reconsideration Order* at ¶ 17.

¹⁵ *Id.* at ¶ 16 (emphasis supplied). The term "control" means: "the possession directly or indirectly, of the power to direct or cause the direction of the management and policies of a company, whether such power is exercised through one or more intermediary companies, or alone, on in conjunction with, or pursuant to an agreement with, one or more other companies, and whether such power is established through a majority or minority ownership or voting of securities, common directors, officers, or stockholders, voting trusts, holding trusts, affiliated companies, contract, or any other direct or indirect means." 47 C.F.R. § 32.9000.

respective partnership. Thus, each of PrimeCo's ultimate three owners — AirTouch, U S WEST, and Bell Atlantic — arguably controls PrimeCo. As a result, a strict reading of the affiliate requirement would require PrimeCo to charge the same prices for its interstate toll services which are charged by its controlling parents. The only way that PrimeCo could comply (other than not providing interstate interexchange services) would be for all three carriers and PrimeCo to agree to charge the identical rates for their respective interstate toll services, an option that raises obvious antitrust implications and anti-competitive impacts.

The affiliate compliance problem does not end with PrimeCo because PrimeCo as well as its controlling carriers share control of other CMRS carriers with other entities. Each of PrimeCo's three owners owns or controls other CMRS carriers in their own right. U S WEST owns U S WEST NewVector Group, Inc., a cellular provider, and will provide PCS service through a separate division of U S WEST. Similarly, AirTouch provides service through a number of separately licensed affiliated entities. Further, in addition to its own CMRS operations, Bell Atlantic is a 50/50 partner with Frontier Corporation of Upstate Cellular Network. In some cases, each of these CMRS carriers also share control with yet other entities in other licensees. Thus, if taken to its extreme, the affiliate requirement could arguably be viewed as not only requiring rate integration between all of PrimeCo's license entities, but also may be viewed as requiring AirTouch, U S WEST and Bell Atlantic to integrate their interstate, interexchange rates as well as the rates of all other CMRS carriers they own or with whom they share control. In turn, these "third generation" carriers could be trapped in this rate integration chain.

In short, the affiliate compliance problem is not isolated but rather spirals outward in an expanding "daisy-chain." Such a result on its face arguably could require unlawful price

fixing and would run counter to important antitrust policies and to the Commission's important pro-competitive policies.

C. A Temporary Stay of Enforcement Will Not Injure Other Parties and Will Serve the Public Interest

Grant of a stay will not adversely affect the legitimate interests of any party affected by the rate integration and affiliate requirements. To the contrary, the requested relief will serve the public interest by relieving CMRS carriers, who would otherwise face the virtually impossible task of complying with the Commission's directive.

Consumer interests, including consumers in remote points such as Hawaii and Alaska, likewise will not be injured by granting stay. Until now, the CMRS industry has not been subject to rate integration obligations. Further, the integration rule does not require the abrogation of existing contracts.¹⁶ Finally, the CMRS industry is highly competitive and market pressures work to keep rates low. Thus, a temporary stay of the affiliate requirement should not adversely affect rates or service offerings currently provided to consumers.

Of primary importance, grant of the requested stay will serve the public interest. Indeed, a stay will allow CMRS carriers to maintain competitive rate structures and offerings which is in the public interest. Further, and as discussed above, there is no evidence demonstrating an immediate need for integration of CMRS interstate, interexchange rates or for integration to spread across affiliates. Imposition of the affiliate requirement as currently enunciated, however, imposes significant compliance burdens upon PrimeCo and numerous other CMRS carriers. In such circumstances, the public interest would best be served by

¹⁶ "In addition, the conferees do not intend that this subsection would require the renegotiation of existing contracts for the provision of telecommunications services." Joint Explanatory Statement at 132, S Conf. Rep. No. 104-104, 104th Cong., 2d Sess. 132 (1996).

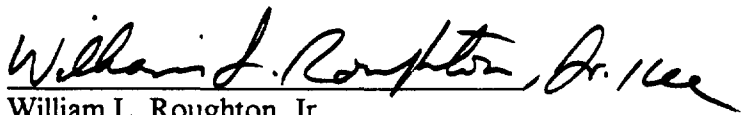
maintaining the *status quo ante* while the Commission develops a record and analyzes the many, complex issues related to application of rate integration and affiliate rules to the CMRS industry.

III. CONCLUSION

For the reasons stated above, the Commission should stay enforcement of the integration rule insofar as the *Reconsideration Order* makes that requirement applicable to the CMRS industry.

Respectfully submitted,

PRIMECO PERSONAL COMMUNICATIONS, LP

By: 
William L. Roughton, Jr.
Associate General Counsel

1133 - 20th Street, N.W., Suite 850
Washington, D.C. 20036
(202) 496-9570

Its Attorney

September 23, 1997

CERTIFICATE OF SERVICE

I, Shelia L. Smith, hereby certify that on this 23rd day of September 1997, copies of the foregoing Motion for Stay of Enforcement of Primeco Personal Communications, LP in CC Docket No. 96-61 were served on the following by hand to:

The Honorable Reed E. Hundt
Chairman
Federal Communications Commission
1919 M Street, NW, Room 814
Washington, DC 20554

The Honorable James J. Quello
Federal Communications Commission
1919 M Street, NW, Room 802
Washington, DC 20554

The Honorable Susan Ness
Federal Communications Commission
1919 M Street, NW, Room 832
Washington, DC 20554

The Honorable Rachelle B. Chong
Federal Communications Commission
1919 M Street, NW, Room 844
Washington, DC 20554

Dan Phythyon
Wireless Telecommunications Bureau
Federal Communications Commission
2025 M Street, NW, Room 5002
Washington, DC 20554

Rosalind K. Allen
Wireless Telecommunications Bureau
Federal Communications Commission
2025 M Street, NW, Room 7002
Washington, DC 20554

Regina M. Keeney
Common Carrier Bureau
Federal Communications Commission
1919 M Street, NW, Room 712
Washington, DC 20554

A. Richard Metzger, Jr.
Common Carrier Bureau
Federal Communications Commission
1919 M Street, N.W., Room 500
Washington, D.C. 20554

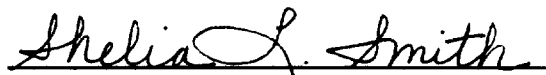
James D. Schlichting
Common Carrier Bureau
Federal Communications Commission
1919 M Street, N.W., Room 518
Washington, D.C. 20554

Patrick J. Donovan
Common Carrier Bureau
Federal Communications Commission
2033 M Street, N.W., Room 500
Washington, D.C. 20554

William Bailey
Common Carrier Bureau
Federal Communications Commission
1919 M Street, N.W., Room 518
Washington, D.C. 20554

John B. Muleta
Common Carrier Bureau
Federal Communications Commission
2025 M Street, N.W., Room 6008
Washington, D.C. 20554

Jeanine Poltronieri
Wireless Telecommunications Bureau
Federal Communications Commission
2025 M Street, N.W., Room 5002
Washington, D.C. 20554


Shelia L. Smith